APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANNY ROY SHOEMAKER, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

No. 22,912

[May 22, 1969]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, HAMLEY and CARTER, Circuit Judges

HAMLEY, Circuit Judge:

Danny Roy Shoemaker, classified in the selective service system as I-O, failed to report to assigned civilian work as ordered by his local draft board. He was indicted for knowingly failing to perform a duty in violation of Section 12(a) of the Universal Military and Service Act (Act), 62 Stat. 622 (1948), 50 U.S.C. Appendix § 462(a) (1964). Following a non-jury trial he was convicted and given a three year sentence under 18 U.S.C. § 4208(a)(2) (1964). This appeal followed.

Shoemaker argues that he should have been acquitted because he presented a prima facie case for a IV-D ministerial classification and he asserts that no evidence whatsoever appears to rebut the claim. Under a IV-D classification a registrant, as in the case of a I-O classification, is exempt from induction. But one classified IV-D, unlike a I-O registrant, is not subject to a board order requiring him to engage in selected civilian employment for any pe-

riod of time. See section 6(g) of the Act, 62 Stat. 604, 50 U.S.C. Appendix § 456(g) (1964); *Daniels* v. *United States*, 9 Cir., 372 F.2d 407, 409, note 2.

Shoemaker did not defend in the trial court on the ground that he was entitled to a IV-D classification. In the absence of plain error, points not raised in the trial court will not be considered on appeal. *Yeater* v. *United States*, 9 Cir., 397 F.2d 975.

In our opinion there was neither plain error within the meaning of Rule 52(b), Federal Rules of Criminal Procedure, nor was there error of any kind with respect to this IV-D contention.

Examination of Shoemaker's selective service file establishes that he requested a I-O classification, and that is what he received. He did not seek a IV-D classification, indicating at most that he hoped to qualify for such a classification at a later time. He was advised by the local board, in effect, that if and when he expanded his ministerial activity to such an extent that he was entitled to a IV-D classification, he should present evidence thereof to the board. Shoemaker submitted no additional evidence of this kind and did not, formally or informally, request a reopening of his classification after the appeal board classified him I-O.

Apart from Shoemaker's failure to seek a IV-D classification from the agency, there is, in any event, a basis in fact for his I-O classification as distinguished from a IV-D classification.[1] Shoemaker would not have been entitled to a IV-D classification unless the ministry was his vocation. See *Langhorne* v. *United States*, 9 Cir., 394 F.2d

1. A selective service classification may not be overturned for lack of evidentiary support if there is a basis in fact for the classification. *Witmer* v. *United States*, 348 U.S. 375, 381, 383.

129. Shoemaker did not assert, that he worked more than about ten hours a week in furtherance of his ministerial duties. He therefore failed to establish that the ministry was his vocation. See *Daniels* v. *United States*, 9 Cir., 404 F.2d 1049, 1050-1051.

Shoemaker also contends that he should have been acquitted because, when he was ordered to perform civilian work, he was not given or offered a final physical inspection.

Shoemaker did take the regular pre-induction physical examination required of all registrants, and was found physically acceptable. Selective service regulations do not require that registrants classified I-O, as distinguished from registrants classified I-A or I-A-O, be subject to a final physical inspection before being ordered to report for civilian work. *Briggs* v. *United States*, 9 Cir., 397 F.2d 370, relied upon by Shoemaker on this branch of the case, pertains to I-A registrants, and is therefore distinguishable.

The regulations require fair and equal treatment of all those subject to the Act. See section 1(c) of the Act, 62 Stat. 605 (1948), 50 U.S.C. Appendix § 451(g) (1964), and 32 C.F.R. § 1622.1. But there is a rational basis for exempting those classified I-O from the provision for a final physical inspection. Unlike those classified I-A and I-A-O, there is no possibility that registrants classified I-O will be subject to the rigors of military life in a combat zone. In view of this rational basis for exempting I-O registrants from final physical inspections, it cannot be said that Shoemaker was not accorded fair and equal treatment.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, June 12, 1969.

Before: BARNES, HAMLEY and CARTER, Circuit Judges.

Order Denying Petition for Rehearing

ON consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed June 5, 1969 and within time allowed therefor, and valid extension thereof, by rule of Court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Universal Military Training and Service Act of 1951, As Amended (50 U.S.C.A. App. § 456 (j)).

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely

personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local

board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.